ORIGINAL

DOCKET FILE COPY ORIGINAL



**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Local Competition and Broadband Reporting | ) | CC Docket No. 99-301 |
| | ) | |
| | ) | |

# COMMENTS OF AT&T CORP

Mark C. Rosenblum
Stephen C. Garavito
James W. Grudus
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920

David L. Lawson
Christopher T. Shenk
SIDLEY & AUSTIN
1722 Eye St.
Washington, D.C. 20006

Howard J. Symons
James J. Valentino
Jonathan P. Cody*
MINTZ, LEVIN, COHN, FERRIS
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2608

*Attorneys for AT&T Corp.*

March 19, 2001



* Admitted in Massachusetts only practicing under the supervision of members of the Washington, D.C. office of Mintz, Levin

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Local Competition and Broadband Reporting | ) | CC Docket No. 99-301 |
| | ) | |
| | ) | |

## COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") submits these comments in response to the Commission's Second Notice of Proposed Rulemaking ("2nd NPRM"), released January 19, 2001 in the above captioned proceeding.[1]

## INTRODUCTION AND SUMMARY

In March 2000, the Commission instituted mandatory data reporting rules that require carriers to collect and report data relating to the development and deployment of local telephone and broadband services.[2] AT&T generally supports these requirements and has spent thousands of hours collecting, analyzing, and validating its data to comply with them. However, AT&T cannot support changes to these requirements that would impose new burdens on carriers, would not result in any defined public benefit, and would compromise the confidential status of AT&T's commercially sensitive information.

---

[1] Second Notice of Proposed Rulemaking, *Local Competition and Broadband Reporting*, CC Docket 99-301, (rel. Jan. 19, 2001) ("2nd NPRM").

[2] Report and Order, *Local Competition and Broadband Reporting*, 15 FCC Rcd 7717 (2000) ("*Data Gathering Order*"). The data is reported by carriers in FCC Form 477 ("Form 477").

The data supplied by carriers' in Form 477 provides the Commission with more than sufficient information to carry out its statutory duty to monitor local telephone competition and broadband deployment.[3] The new reporting requirements proposed in the 2nd NPRM, therefore, are unlikely to result in any appreciable public benefits.[4] On the other hand, as demonstrated below, many of those new reporting requirements would *significantly increase the burdens* that are already imposed on AT&T and other carriers.[5] Additionally, although the Commission's proposal to collect information on "availability" might be useful, no workable definition or rules of applicability are stated in the 2nd NPRM. For these reasons, the Commission should not adopt most of the proposed changes in reporting requirements.

The information supplied by carriers' in Form 477 is also competitively sensitive information under the Commission's current rules. The disaggregated line count and related data contained in a carrier's Form 477 submissions provides a virtual roadmap to the carrier's strategic market positions and entry strategies, its current ability to provide local telephone and broadband services in each geographic area, and even the quality of the services that it can provide. Because of the obvious competitive sensitivity of such information, AT&T and other

---

[3] *See* Pub. Law No. 104-104, Title VII, § 706(b), reproduced in the notes under 47 U.S.C. § 157.

[4] The 2nd NPRM fails to identify any public interest from imposing the new and burdensome requirements that cannot be obtained from the data that is already reported by carriers.

[5] It is noteworthy that the cost of complying with more detailed requirements rises exponentially, not incrementally. The Commission's proposed reporting requirements, if adopted, would require AT&T and other carriers to develop new reporting systems and procedures that are not otherwise used in the normal course of business. Additionally, because carriers must divert resources away from serving customers in order to comply with the Commission's data reporting requirements, consumers also bear a portion of the burden imposed by those reporting requirements. Moreover, since many competitors in the broadband community currently face tight financial markets and decreasing resources, now is an especially inappropriate time to consider new, unnecessary and costly reporting burdens on these broadband providers.

carriers carefully guard this information against disclosure to competitors. And, the Commission repeatedly stressed in the Data Gathering Order that it would provide that data all of the confidentiality protections afforded by the Commission's rules.

The Commission now proposes, however, to establish a new presumption that the data in Form 477 does not typically meet the Commission's standards for competitively sensitive information. There is no basis for any such presumption. Form 477 data are unquestionably the same type of highly confidential, company specific data that the Commission's decisions have always shielded from public disclosure. Moreover, the Form 477 data fall comfortably within the scope of the federal Trade Secrets Act, 18 U.S.C. §1905, an area in which the courts have cautioned the Commission to be especially vigilant in enforcing its confidentiality rules. Indeed, the case for the competitive sensitivity of Form 477 data is so clear under the Commission's existing rules and precedents that the Commission should adopt precisely the opposite presumption – that Form 477 data *are* competitively sensitive – and place the burden on those seeking disclosure of a carrier's disaggregated data.

The Commission should also reaffirm that it will not disclose disaggregated Form 477 data *sua sponte* – either to the public or to specific outside parties. The Commission has recognized that it can achieve substantially the same public benefits by releasing the data only in aggregated form. There are no possible benefits from public disclosure of carrier-specific disaggregated data, much less any compelling public need that could outweigh the obvious and substantial competitive harms associated with disclosure.

The Commission should likewise revisit its existing policy of disclosing Form 477 data to state commissions that promise to protect the data from further disclosure. The problem with this policy is that it affords carriers no opportunity to enforce the state agencies'

promises to protect the data. Therefore, the Commission should, at a minimum, ensure that each carrier whose data is requested by a state commission receives third party beneficiary rights to enforce state promises of confidentiality. The better practice, of course, would be to refer all such state commission requests to the affected carriers.

## I. THE COMMISSION'S PROPOSED BROADBAND REPORTING REQUIREMENTS ARE UNNECESSARILY BURDENSOME.

AT&T supports, and indeed benefits from, the Commission's efforts to report on the development, status and deployment of local telephone and broadband services throughout the United States. However, AT&T cannot support proposals that would change the existing reporting requirements in ways that would impose extraordinary new burdens on AT&T and other carriers that far outweigh any possible benefits that could be obtained from their implementation. For this reason, the Commission should reject several of the proposals in the 2nd NPRM.

### A. The Commission Should Not Require Broadband Providers to Report Data by Zip Code.

The Commission currently requires carriers to report data on a state-by-state basis. *Data Gathering Order* ¶ 49. The 2nd NPRM (¶ 18), however, proposes to change that rule and require carriers to "report the actual subscribership by zip code, in lieu of the current requirement that providers report a list of zip codes where broadband service is being delivered." Likewise, the Commission proposes to have carriers report the type of technology used, the type of subscriber (residential or business), and pricing information, all at the zip code level. *Id.* ¶¶ 18-19. These proposals should be rejected.

The Commission should affirm its previous decision which rejected the notion that Form 477 data should be reported by zip code. There is no question that forcing carriers to report data at the zip code level would be extremely burdensome. The Commission has already

recognized that "completing forms at . . . finer levels of geographic granularity would be administratively more difficult for providers," *Data Gathering Order* ¶ 53, and that "to complete over 30,000 zip-code based forms would impose costs far greater than the benefits to be derived." *Id.* And these administrative burdens are only the tip of the iceberg.

Many broadband providers, including AT&T, do not actually store the type of data required by Form 477 by zip code. Some of AT&T's operational systems (containing the relevant data), for example, are not interoperable with the systems that contain zip code data in a way that permits linkage of the two data elements. Consequently, AT&T would have to develop software and purchase systems that could address these interoperability issues – investments would be significant and only useful for complying with the proposed new reporting requirements.[6] And in cases where new computer software could not be developed, the data would have to be collected manually, an especially arduous task.

Moreover, AT&T often could not provide Form 477 data at the zip code level without first engaging in additional data analyses. For instance, to report pricing information at the zip code level, AT&T would have to account for customer-specific discounts that arise with multiple bundled offerings, or that are associated with various contract lengths. Requiring carriers to report the Form 477 data at the zip code level would also result in significant indirect costs to their customers. Some of the resources that carriers would normally devote to developing and deploying services, addressing customer inquiries, and similar business activities

[6] Of course these systems could not be installed and implemented overnight. A significant allocation of resources would be required to design, develop, implement, test, and verify the systems and interfaces before they could be effectively used.

would be diverted to meeting the required data collection requirements. Thus, consumers would also bear part of the burden of reporting data at the zip code level.

Simply put, forcing carriers to report data at the zip code level would be extremely burdensome and would not result in identifiable, tangible benefits. Thus, the proposal in the 2nd NPRM to require carriers to report data by zip code plainly should not be adopted.

### B. The Commission Should Not Require Carriers to Report Data That Distinguishes Between Broadband, Residential and Small Business Customers.

The Commission currently requires carriers to report actual or estimated subscriber data for only two classes of users: (1) residential and small business users; and (2) large business and institutional users. The 2nd NPRM (¶ 17) proposes to require carriers to go further and report data in a way that distinguishes between residential and small business services. This proposal should be rejected.

The Commission has already recognized that, "many broadband providers will not routinely keep records by type of customer." *Data Gathering Order* ¶ 69. AT&T, for one, does not keep separate data on residential and small business customers because there is little (and often no) difference in the types of services provided to those customers.[7] Consequently, the only reliable way for AT&T to determine which customers are residential and which are

[7] This fact has been recognized by the Commission. *See* Report *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd. 2398 ¶ 28, n.28 (1999) (noting that "small business customers share significant characteristics with residential customers"); *see also* Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696 ¶ 293 (1999) ("small businesses are likely to use the same number of lines as many residential subscribers and purchase similar volumes and types of telecommunications services").

small businesses would be to examine AT&T's sales records.[8] The time and money that would have to be spent on such a task would be immense. On the other hand, the 2nd NPRM does not identify any particular benefits that could result from imposing such a burden on broadband service providers. Accordingly, the Commission should reject the proposal that would require carriers to breakdown subscriber information by residential and small business customers.

### C. The Commission Should Not Require Carriers to Report Information on Private Broadband Lines.

The 2nd (¶ 22) NPRM also proposes to implement a new reporting requirement that would require carriers to identify the number and type of private lines with broadband capacity but which do not connect end-users to the Internet or other public data networks. This proposal should be rejected because it would produce minimal benefits, but would impose significant burdens on carriers.

Private broadband lines that do not connect end-users to the Internet or other public data networks are typically purchased only by large businesses and institutions. The Commission has recognized on several occasions that a "wide variety of broadband services are generally available to business customers,"[9] and that "large business customers appear to be able to purchase such services with relative ease." 2nd NPRM ¶ 22. Consequently, there is little, if any, benefit to requiring carriers to collect and report this type of information. By contrast, the added burden on carriers from complying with these new reporting requirements would be

---

[8] Even this task would produce only rough estimates given the fact that many small businesses order residential service.

[9] Second Report, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket 98-146, ¶ 75 (rel. Aug. 21, 2000) ("2nd 706 Report").

(footnote continued on next page)

extraordinary. The Commission itself recognizes that it is "difficult for providers to report accurate and comparable line counts" for private line services. *Id.* AT&T, for one, does not track this type of information at a centralized location. Rather this data is located within numerous databases and files located throughout the country and, therefore, collecting this data would impose significant burdens on AT&T. Put simply, the Commission should continue to exclude information on broadband lines that connect end-users to private networks from its reporting requirements because the benefits of requiring carriers to report that data are minimal, if any, whereas the burden on carriers of reporting that data are immense.

### D. The Commission Should Not Require Carriers To Report Certain Other Miscellaneous Disaggregated Data.

The 2nd NPRM (¶¶ 20-21) asks whether there are other ways to collect data that would provide insight into a variety of issues such as unserviceable demand, low subscription rates, termination rates, and deployment to certain discrete populations and demographic groups that may "be particularly vulnerable to not receiving timely access to broadband services through market forces alone." AT&T would not oppose collection and reporting of this type of data if the benefits would justify the costs.[10] However, the Commission should not add these new reporting requirements to Form 477. Rather, this type of data should be sought in discrete proceedings that are specifically targeted to addressing these issues.

---

(footnote continued from previous page)

[10] AT&T and other parties are working diligently to provide broadband services to all Americans, including those discrete populations and demographic groups identified by the Commission.*See, e.g.*, *Second 706 Report*, Comments of AT&T at 28-30; Sprint at 1-2; Hughes at 2-3; SBC at 12-13; CIX at 8; National Rural Telecommunications Association at 2, 7-9; National Exchange Carrier Association at 3-5.

Whereas the data collected from carriers in Form 477 are designed to provide the Commission with a "baseline of knowledge and understanding" about broadband deployment to "guide [the Commission] in assessing the overall effectiveness of its actions," Data Gathering Order, ¶ 13, information about unserviceable demand, low subscription rates, termination rates, and the deployment to certain discrete populations and demographic groups is very specific. The Commission, therefore, should avoid imposing unnecessary burdens on all carriers by requiring them to report this type of information for all of their service areas. Instead, the Commission should continue to use Form 477 to obtain a baseline of knowledge and address more unique geographic (or carrier) issues by asking for specifically targeted information in discrete proceedings.

### E. The Commission's Proposal to Track "Availability" Although Potentially Useful, Is Unworkable As Currently Set Forth.

The 2nd NPRM (¶ 20) tentatively concludes that all broadband providers should report data on the *availability* of local telephone and broadband services in addition to number of subscribers actually served. While AT&T generally agrees that a metric identifying broadband service "availability" would be useful, it is essential that an "availability" metric be comparable among all reporting broadband providers and that carriers be able to provide relevant data with a minimum of additional burden.[11]

[11] For example, while an upgraded coaxial cable plant might be susceptible to quantification by "homes passed," the same is not necessarily true for xDSL services. To the extent that AT&T provides xDSL services over an incumbent LEC's local loop, AT&T does not know the exact number of customers to whom those services are available because that depends on factors known only by the incumbent LEC, *e.g.*, the extent to which the line is upgraded, the quality of those lines and so on.

Before requiring the collection of data on "availability", the Commission must identify what exactly it means for a consumer to have broadband services "available" to him or her. To neglect this very important step opens the door to disparate and self-serving interpretations and will make any such "availability" metric meaningless. Once the Commission has set an appropriate "availability" definition, it should propose rules for applying that definition to each broadband technology platform to ensure comparable measurements among the differing technologies. Industry participants should be given full opportunity to comment on these specific rules. Only through such a process can the Commission obtain meaningful, industry-wide information while minimizing burdens. In the absence of a generally agreed-upon definition and rules of applicability, however, it is premature to attempt to collect data on "availability."[12]

### F. The Commission Should Not Lower Or Eliminate The Reporting Threshold For Broadband Services.

The Commission should reject the proposal in the 2nd NPRM (¶ 13) to lower or eliminate the current reporting threshold of 250 lines. Many of the areas where AT&T and other carriers serve fewer than 250 lines are places where service is being newly deployed or areas where the market is being tested for potential full-scale entry. To the extent that new Form 477 reporting requirements would increase carriers' costs, they would also slow the development and deployment of broadband services into those markets by increasing the costs to even test services in new markets. Indeed, in order to avoid such an unintended result, the Commission should

[12] AT&T is open to discussions regarding how broadband providers with varying delivery methods might provide accurate and useful availability information in a non-burdensome manner.

consider increasing, not decreasing, the broadband deployment threshold for all reporting entities.

The Commission should not, however, create special reporting threshold exemptions for certain reporting entities. *See* 2nd NRPM ¶ 14. Doing so would only distort competition by unfairly burdening some carriers with additional regulatory reporting requirements while allowing other carriers to operate without those burdens. To avoid such market distortions, the Commission should continue to implement its reporting requirements on a uniform and fair basis.

### G. The Commission Should Take Steps to Reduce Form 477 Reporting Burdens That Are Imposed on Carriers.

Complying with the Commission's current Form 477 reporting requirements is very costly to carriers. Indeed, preparation of AT&T's March Form 477 submission required thousands of hours (by over *fifty* employees).[13] And these costs of complying with the Form 477 requirements increase substantially where the time for collecting and reporting the required data is shortened. AT&T, therefore, urges the Commission to mitigate the burdens of complying with

[13] It is noteworthy that the federal broadband reporting requirements have done little to decrease state reporting burdens, and therefore reduce the overall burdens on broadband providers, as the Commission had hoped. *See Local Competition and Broadband Reporting*, CC Docket No 99-301, Notice of Proposed Rulemaking, FCC 99-283, ¶ 16 (rel. Oct. 22, 1999) ("[w]e think a properly designed federal program can complement state efforts and end up reducing the reporting burdens imposed, overall, on carriers"). In fact, the Form 477 has increased some states' individual reporting requests as some states have required broadband providers to file duplicate reports with the state or additional broadband data at the state level. *See, e.g.*, IND. CODE § 8-1-2-52; Indiana Utility Regulatory Commission, *Local Competition Survey For Year End 2000* (requiring broadband providers to provide the Indiana Utility Regulatory Commission with certain requested information, which includes details regarding high capacity lines in service and other broadband data). Other states, like Ohio, are considering requiring quarterly Form 477s by "ILEC service area level rather than at state level." *In the Matter of the Commission Ordered Investigation of the Existing Local Exchange Competition Guidelines*, Case No. 99-998-TP-COI, Staff's Proposed Rules (filed March 1, 2001), §4901:1-6-33(C).

Form 477 by reducing the reporting frequency to an annual rather than a semi-annual basis. 2nd NPRM ¶ 28. Such a change in the frequency of Form 477 reporting would be consistent with the Commission's goal of "eliminat[ing] any unnecessary or unduly burdensome aspects of the reporting program." *Id.* ¶ 2.[14]

In all events, the Commission should avoid imposing unnecessary burdens on AT&T and other carriers by ensuring that the Commission releases Form 477 no later than three months prior to the filing deadline. The Commission's most recent reporting deadline, March 1, 2001, was preceded by the Commission's release of Form 477 on January 30, 2001,[15] *a mere twenty-nine (29) days before the filing was due.* This type of condensed timetable can impose significant and unnecessary burdens on reporting carriers and jeopardizes the ability of carriers to accurately report the Form 477 data. Indeed, even minor changes in Form 477 often reduce the accuracy of those reports, especially if the carrier's data collection efforts were already underway. AT&T, for instance, begins collecting Form 477 data from every region of the country months before the Form 477 filing deadline. Last minute changes to Form 477,

[14] The Commission should not, however, reduce the frequency of reporting as part of a program to require carriers to report additional or more detailed data. *See* 2nd NPRM ¶ 28. As demonstrated above, the type of increased detail suggested in the 2nd NPRM would inevitably result in an exponential increase in the costs and resources needed to comply with the new reporting requirements. Reducing the frequency of the reporting requirements could not offset those increased burdens.

[15] *See* Public Notice, *FCC Announces Release of FCC Form 477 (Local Competition and Broadband Reporting Form) for the March 1, 2001 Filing*, CC Docket No 99-301, DA 01-237 (rel. Jan. 30, 2001).

therefore, impose incredibly burdensome and inefficient administrative costs on AT&T as it attempts to reorganize the data to conform with the new requirements.[16]

## II. THE COMMISSION SHOULD NOT REQUIRE WIRELESS PROVIDERS TO REPORT SUBSCRIBERS FROM PRE-PAID SERVICES.

The Commission should reject the proposal in the 2nd NPRM (¶ 24) to require "mobile telephone service providers [to] report subscribers from distributors of pre-paid services as though these subscribers are 'billed directly.'" Rather, the Commission should retain its existing requirements and clarify that wireless carriers, as part of the estimating process, can assume that the number of pre-paid customers in a state is roughly the same proportion as post-paid customers in the state.

The Commission has already recognized the difficulty of reporting the exact number of pre-paid subscribers. The Commission therefore determined that because "providers of mobile telephony services may not have a billing address for prepaid subscribers," they need only "include prepaid subscribers in their state totals by making good faith estimates." *Data Gathering Order* ¶ 85. AT&T's experience confirms the wisdom of the Commission's determination. It is extremely difficult for AT&T to accurately apportion pre-paid wireless customers among states because AT&T does not generally have a billing address for these customers (these customers are not billed). One of AT&T's wireless products does not even provide customers with a NPA-NXX number that could be used to estimate the customer's

[16] To the extent that the Commission institutes a rule change that cannot be reflected on Form 477 prior to three-months before the filing deadline, the rule change should not be implemented on the Form until the next reporting period.

location.[17] Simply put, the Commission's current requirement that carriers use good faith estimates to allocate pre-paid wireless customers to particular states provides as accurate a result as is possible without undue burden. Any additional requirements would impose extraordinary burdens on AT&T and other wireless carriers without any appreciable gain in accuracy, and could well cause carriers to change the way they provide these services to the public.

## III. THE DISAGGREGATED DATA CONTAINED IN AN INDIVIDUAL CARRIER'S FORM 477 SUBMISSIONS MUST BE PROTECTED FROM DISCLOSURE.

The highly disaggregated line count and related data contained in a carrier's Form 477 submissions provides a virtual roadmap to the carrier's strategic market positions and entry strategies, its current ability to provide local telephone and broadband services in each geographic area, and even the quality of the services that it can provide. Because of the obvious competitive sensitivity of such information – and the all too real concern that it could be used by incumbent LECs and others to impede the very competition the 1996 Act is designed to foster – AT&T and other carriers guard that information carefully to ensure that it does not become publicly available. Accordingly, AT&T and other carriers have consistently requested, pursuant to the Commission's confidentiality rules, that their Form 477 data not be disclosed to third parties. Those confidentiality rules reflect the Commission's longstanding view that it must be especially "sensitive to ensure that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage." Report and Order, *Examination of Current Policy Concerning the Treatment of*

[17] AT&T provides these customers with a 1-800 number along with a pin number to access the service.

*Confidential Information Submitted to the Commission*, 13 FCC Rcd. 2416 (1998) ("*Confidentiality Order*").

In the *Data Gathering Order*, the Commission properly recognized that timely and orderly reporting of local competition and broadband data in a manner that promotes, rather than undermines, the pro-competitive provisions of the 1996 Act can be achieved only if the Commission strictly enforces its established policies of safeguarding competitively sensitive data from unnecessary disclosure. Accordingly, although it declined to make an across-the-board ruling that all Form 477 data submitted by all carriers is competitively sensitive, the Commission stressed that it would "honor all parties' requests for confidential treatment of information that they identify as competitively sensitive until persons requesting confidential treatment are afforded all of the procedural protections provided by our confidentiality rules." *Id.* ¶ 89. The Commission even took "an additional step to reduce provider concerns about the release of information identified as competitively sensitive by making it easier for providers to request confidential treatment of their data." *Id.* ¶ 90 (providing a confidential treatment "check-box on the first page of the FCC Form 477").

The legitimate confidentiality concerns associated with Form 477 data are only heightened by the Commission's proposals in the 2nd NPRM to require carriers to submit additional and even more highly disaggregated data. Despite the increased need for confidentially, however, the 2nd NPRM proposes an unprecedented and unsupportable about face with respect to confidentiality. Specifically, the Commission seeks comment on whether it "should establish a rebuttable presumption that some or all of the data in Form 477 does not typically meet [Commission] standards for competitively-sensitive information." 2nd NPRM ¶ 26. The Commission plainly should not do so.

There is no basis for any such presumption. As detailed below, Form 477 data are unquestionably highly confidential, company-specific data that are of the type that the Commission's decisions have always properly treated as competitively-sensitive information and shielded from unnecessary disclosure. The Form 477 data also falls comfortably within the scope of the Trade Secrets Act, 18 U.S.C. § 1905, an area in which the courts have cautioned the Commission to be especially vigilant in enforcing its confidentiality rules. *See Qwest Communications International v. FCC*, 229 F.3d 1172 (D.C. Cir. 2000). Indeed, the case for the competitive sensitivity of Form 477 data is so clear under the Commission's existing rules and precedents that the Commission should establish precisely the opposite presumption. Based upon the extensive record in this docket, the Commission should presume that Form 477 data *are* competitively sensitive and place the burden on those seeking disclosure to demonstrate that there is no possibility of competitive harm from disclosure of a carrier's disaggregated data. *Cf.* 47 C.F.R. O.457(d) ("[t]rade secrets . . . are not routinely available for public inspection . . . . A persuasive showing as to the reasons for inspection of such materials will be required").

Regardless whether it properly presumes the competitive sensitivity of Form 477 data or retains the *Data Gathering Order* (¶ 88) framework of case-by-case litigation of that issue each time a third party requests access to the data under the Freedom of Information Act, the Commission should reaffirm that it will not publicly disclose disaggregated Form 477 data *sua sponte*. As the Commission held in the *Data Gathering Order*, it "can achieve substantially the same public benefits by releasing this information [only] in an aggregated fashion without any potential risk of competitive harm on the part of the respondents." *Data Gathering Order* ¶ 91; *see also id.* ¶ 87 ("we can achieve [our] goal[s] in a manner that ensures the non-disclosure of confidential provider-filed data"). And, beyond the unsupported observation that "the value

of [a] data collection is significantly enhanced by making as much information as possible available to the public," 2nd NPRM ¶ 25, the 2nd NPRM identifies no demonstrable benefit from public disclosure of carrier-specific disaggregated data, much less any compelling public need that could outweigh the obvious and substantial competitive harms associated with disclosure. *See Confidentiality Order* ¶ 8 ("the Commission generally has exercised its discretion to release publicly information falling with FOIA Exemption 4 only in very limited circumstances, [such as] . . . where the Commission has identified a *compelling* public interest in disclosure") (emphasis added).

The 2nd NPRM (¶ 29) does suggest that there might be some benefit in more limited disclosure of disaggregated Form 477 data to "outside academics" (and undefined "outside parties") who could assist the Commission in "analyz[ing] th[ese] data." Even assuming *arguendo* that the Commission could, through protective order conditions or other means, adequately protect the Form 477 data from further, competitively harmful dissemination, there is no basis for any such selective disclosures. As an initial matter, the Commission has its own able staff of economists, statisticians, and industry analysts that are fully capable of applying sophisticated statistical and other analytical techniques to disaggregated Form 477 data. In any event, as the courts have recognized, statisticians and other data analysts do not require the actual disaggregated data to be able to recommend appropriate methodologies for analyzing a data set. *Qwest Communications,* 229 F.3d at 1183 (the "methodology could be evaluated in theoretical terms as applied to hypothetical situations or to a composite of raw data without identifying an individual [firm's] sensitive commercial information"); *id.* at 1183-84 ("A response that the protective order adequately protects [the carrier] against competitive injury misses the mark. The Commission must explain why only the release of raw . . . data will

achieve meaningful public comment"). The Commission should, accordingly, reject the 2nd NPRM proposal (¶ 29) to disclose disaggregated Form 477 data to academics or other "outside parties."

The Commission should likewise revisit its existing policy of disclosing Form 477 data to state commissions that purport to protect the confidentiality of that data. At a minimum, each carrier whose data is requested by a state commission should receive pre-disclosure notice and an opportunity to be heard, and the Commission should insist that the states grant carriers third party beneficiary rights to enforce state promises of confidentiality. The better practice, of course, would be simply to refer all such state commission requests to the affected carriers.

Proper safeguarding of competitively sensitive data is essential if the Commission's local competition and broadband reporting polices are to achieve their stated goal of assisting the Commission in promoting the 1996 Act's pro-competitive policies. Any attempt to deny Form 477 data the full confidentiality protection will almost certainly be met with court challenges, stay applications and other proceedings that could only delay the timely collection and analysis of that data. And, any change in the confidential treatment of Form 477 data that actually caused competitively sensitive data to be publicly disclosed would directly undermine the very competition goals Congress and the Commission have established.

### A. The Disaggregated Form 477 Data Submitted By Competitive Carriers Are Commercially Sensitive.

The Commission has explained that one of the primary reasons for requiring carriers to provide disaggregated Form 477 data is that it will allow the Commission to gain "a better understanding of the pattern and speed" of local telephone and broadband deployment. *Data Gathering Order* ¶ 12. A logical corollary to this stated purpose is that the Form 477

information submitted to the Commission by competitive carriers would be extremely valuable to incumbent LECs and other competitors in developing, evaluating and revising specific strategies to *deter* effective local telephone and broadband competition. The information that AT&T and other carriers provide to the Commission in Form 477 is therefore plainly competitively sensitive and warrants full protection from public disclosure under the Commission's confidentiality rules. It would be ironic indeed if the information that the Commission collects in order to monitor and facilitate the "opening [of] previously monopolized local telecommunications markets to competition" and to "encourage the deployment of advanced telecommunications capability"[18] were used to impede such competition.

Form 477 requires a carrier to identify, on a granular basis, the number of end-users to whom it provides voice-grade equivalent service, the percentage of those customers who are residential or small businesses customers, the number of lines that are owned, leased or provided over UNEs, and the zip codes within each state where the carrier provides services. The form also requires each carrier to provide specific information relating to its deployment of broadband services, including an area-by-area description of the number of broadband customers served by the carrier, the type of broadband technology used to provide those services (*e.g.*, xDSL, cable, fixed wireless, and so on), and the exact location within each state (by zip code) where the carrier provides those services. Simply put, Form 477 provides a roadmap of carriers' competitive entry strategies, strategic market positions, and current abilities to provide particular services in specific geographic areas.

---

[18] See Data Gathering Order ¶¶ 2-3 (citing 47 U.S.C. §§ 251, 252, 271 and § 706 of the 1996 Act).

For that reason, disaggregated Form 477 data clearly qualifies as competitively sensitive data under the Commission's confidentiality rules and precedents. The Commission has recognized, for example, that basic customer information, including customer names and phone numbers, is competitively sensitive (and should therefore be protected from unnecessary disclosure) because that "information would be of interest and benefit to . . . competitors" and would act as a "roadmap [for competitors] to steal customers." *Mobile Relay Associates; Requests for Confidential Treatment of Materials Submitted in Conjunction with Pending Applications*, 14 FCC Rcd. 18919 (1999). Information about a carrier's deployment status, including construction information, is also competitively sensitive, because other businesses could use that information to the carrier's "competitive disadvantage." *Southern Company; Request for Waiver of Section 90.629 of the Commission's Rules,* 14 FCC Rcd. 1851, 1860 (1998). The Commission has likewise recognized the competitive sensitivity of information relating to a carrier's investment in plant, because that information would allow "competitors to devise strategies to introduce new services to the competitors' benefit, or exploit weaknesses in [the filing carrier's] . . . existing operations." *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 14 FCC Rcd. 978 (1999).

In addition, state courts have recognized the highly confidential nature of the type of information in Form 477. For example, the North Carolina Court of Appeals found similar information to be confidential because "provid[ing] public access to [it] . . . would provide competitors rather extensive insight into the business plans of a particular [competitive LEC]." *State of North Carolina ex rel. Utilities Commission v. MCI Telecommunications Corp.,* 514

S.E.2d 276, 283 (N.C.App. 1999).[19] The court went on to explain that access to the information "would allow competitors to discover how a [competitive LEC] serves its customers, . . . [its] plans for entering the local market and how quickly it acquires new customers, . . . in which areas [it] is focusing its marketing efforts and the relative effectiveness of those efforts." *Id.* Thus, the Court concluded that disclosure of that information "would thwart the creativity and innovation that competition brings to the marketplace, and prohibit the competitive environment our legislature intended to create." *Id.*

The touchstone of these and other confidentiality precedents is whether release of the carrier's data would "assist[] competitors in preparing marketing strategies to use in direct competition with [that carrier]." *Southwestern Bell Telephone Company,* Tariff FCC No. 73, DA 96-1927 (released November 19, 1996). Even cursory examination of the nature of Form 477 data confirms its obvious usefulness to competitors. Armed with the information contained in Form 477, incumbent LECs and other established competitors could easily target facility upgrades, new service offers and marketing efforts to areas with the highest concentration of competitive carrier activity or success, thereby frustrating nascent competitive efforts.[20]

---

[19] The information at issue in the North Carolina case included, *inter alia*, the number of business and residential lines served by each competitive local exchange carrier and the number of lines leased or the number of UNEs purchased to provide those services.

[20] For example, an incumbent LEC could use the zip code information in Form 477 to identify the specific areas where a new carrier is successfully providing services and could combine that information with the line count data to identify the scale of that carrier's broadband deployment services in those areas. Indeed, the Vermont Public Services Board has explicitly recognized that carriers could use information obtained from a competitive carrier's interconnection request to "disadvantage" that carrier by "engag[ing] in aggressive marketing and sales in the affected area, such as by offering special contracts to commercial customers, . . . special promotions for high usage residential customers, and an aggressive outbound telemarketing effort to lock up toll agreements." *Joint Petition of New England Telephone & Telegraph Company d/b/a NYNEX, NYNEX Corporation, and Bell Atlantic Corporation for Approval of a Merger of a Wholly-*

(footnote continued on next page)

That is why AT&T has insisted, consistent with the Commission's rules, that its interconnection agreements with incumbent LECs contain provisions that require the incumbents to screen their marketing personnel from CLEC information that the incumbents gain in provisioning network elements and resold services. *See* 47 U.S.C. § 222(b) ("A telecommunications carrier that receives or obtains proprietary information from another carrier for the purposes of providing any telecommunications service shall use such information only for such purposes, and *shall not use such information for its own marketing efforts*") (emphasis provided).[21] One carrier, for example, claims to have "a separate department to service competing carriers' requests for interconnection and access to network elements" and to have constructed "electronic 'fire walls' to ensure that retail employees cannot see the accounts of resellers." *Vermont Order* at 106. Disclosure of the information contained in Form 477 would effectively dismantle any such protections.[22]

Disaggregated Form 477 data can also reveal basic financial information. For example, the number of lines served by a carrier and the method in which the carrier provides

---

(footnote continued from previous page)

*Owned Subsidiary of Bell Atlantic Corporation into NYNEX Corporation (In Re: Compliance Phase)*, Docket No. 5900, 199 PUC LEXIS 363 (June 29, 1999) ("*Vermont Order*").

[21] The Commission has specifically recognized that 47 U.S.C. 222(b) "works to prevent anticompetitive conduct on the part of the executing carrier by prohibiting marketing of use of carrier proprietary information." Second Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996,* CC Docket No. 94-129, ¶ 106 (released December 23, 1998). *See also Vermont Order,* 199 PUC LEXIS 363 (June 29, 1999). *See also Vermont Order* (finding that 47 U.S.C. § 222(b) forbids the use of information obtained by incumbent LECs from competitors' interconnection requests for marketing purposes).

[22] Of course, the Form 477 data also identifies the areas where new entrants are competing with their own facilities (*e.g.*, cable or wireless facilities) – information that would not otherwise be readily available to incumbent LECs or other competitors.

those lines (owned or leased) – *i.e.*, the information contained in Form 477 – provides the necessary foundation for estimating significant portions of carriers' costs. Because the incumbent LECs that serve almost all local customers can also accurately estimate other carriers' revenues per-line, they would also be able to estimate the profits earned by new competitors in specific geographic areas, which would allow the incumbents to focus their competitive attacks to the specific geographic areas where new carriers are most vulnerable to targeted competitive – and anticompetitive – activity.

Because of their extensive reliance on incumbent LEC facilities and services, competitive LEC resellers and purchasers of UNEs are highly susceptible to the type of anticompetitive targeting that would be facilitated by disclosure of disaggregated Form 477 data. For instance, with access to the carrier-specific information contained in form 477, incumbent LECs would be able to more accurately identify the areas in which degrading competitors' service quality would benefit the incumbents the most.[23]

Public disclosure of carriers' Form 477 submissions would be especially damaging to emerging broadband services and deployment. Carriers are competing vigorously in quality and price to gain market share. In this environment, carriers carefully guard their current market positions, deployment plans and service capabilities. But that is the very information contained in Form 477 submissions, which could alert incumbent LECs seeking to preserve their dominance over the transport of Internet traffic (through, for example, targeted DSL provisioning) not only to the particular areas where a cable or wireless competitor has completed upgrades and deployments, but, also, if the 2nd NPRM proposals are adopted, to the

[23] Incumbent LECs could also use Form 477 information to gerrymander proposed UNE rate zones in order to increase potential competitors' costs.